Legal Sidebar

Unanimous Supreme Court Rules Bankruptcy Sale Statute Is Not Jurisdictional

June 20, 2023

On April 19, 2023, the Supreme Court unanimously held in *MOAC Mall Holdings LLC v. Transform Holdco LLC (MOAC)* that 11 U.S.C. § 363(m)—a Bankruptcy Code provision that limits the scope of relief an appellate court may order regarding certain sales or leases of estate property—is not jurisdictional. This means that a party may be barred from invoking the statute's limitations if it fails to do so at the earliest appropriate time in the appellate process. This decision marks the second instance in the Supreme Court's 2022-23 term—the first being *Wilkins v. United States*—in which the Court held that a statute is not jurisdictional.

This Sidebar recounts the *MOAC* decision and analyzes how this holding impacts bankruptcy proceedings. The Sidebar also offers considerations for Congress as to how this decision, along with *Wilkins*, may affect the drafting of jurisdictional and nonjurisdictional statutes.

Background of *MOAC*

A previous Legal Sidebar explains in detail the parameters of § 363(m) and summarizes the factual and procedural history of *MOAC*. Briefly, Sears Holding Corporation (Sears) filed for Chapter 11 bankruptcy in the U.S. Bankruptcy Court for the Southern District of New York. The bankruptcy court approved an agreement to sell most of the bankruptcy estate's assets to Transform Holdco LLC (Transform), the respondent in this case (the Sale Order). Among the assets conveyed to Transform was the right to designate entities to which Sears' leases on certain property should be assigned. Transform exercised this right by designating Sears' lease with petitioner MOAC Mall Holdings LLC (MOAC) in the Mall of America (the MOAC Lease) for assignment to Transform's wholly owned subsidiary under Bankruptcy Code § 365, which governs assignments. MOAC objected to this assignment on the ground that Sears failed to provide assurance of Transform's ability to perform under the lease, as required by § 365. The bankruptcy court rejected that argument and approved the assignment (the Assignment Order).

MOAC wished to appeal the Assignment Order to the district court, but feared that Transform would argue that § 363(m) limited or barred the appeal. Section 363(m) provides that

> [t]he reversal or modification on appeal of an authorization under [11 U.S.C. § 363(b) or (c)] of a sale or lease of property does not affect the validity of a sale or lease under such

> authorization to an entity that purchased or leased such property in good faith, whether or not such entity knew of the pendency of the appeal, unless such authorization and such sale or lease were stayed pending appeal.

MOAC thus moved in the bankruptcy court for a stay pending appeal of the Assignment Order, in the hope that a stay would prevent Transform from arguing on appeal that under § 363(m), no appellate court could undo the Assignment Order. Transform "explicitly represented" that it would not invoke the limitations of § 363(m) on appeal to the district court. The bankruptcy court denied MOAC's stay motion, and MOAC then appealed the Assignment Order to the United States District Court for the Southern District of New York.

Consistent with its representation to the bankruptcy court, Transform did not rely on § 363(m) to oppose MOAC's appeal, and the district court initially ruled in favor of MOAC, vacating the Assignment Order to the extent it approved assignment of the MOAC Lease to Transform. Transform then sought a rehearing, arguing for the first time that § 363(m) deprived the district court of jurisdiction to grant the relief sought by MOAC. Despite Transform's late assertion of this argument, the district court concluded that it could not rule that Transform had waived or should be judicially estopped from raising it. This was because a prior decision of the United States Court of Appeals for the Second Circuit had held that § 363(m) was jurisdictional, meaning that the district court lacked power to hear the appeal absent a stay or argument that the assignment had been executed in bad faith. The district court therefore dismissed MOAC's appeal.

The Second Circuit affirmed the district court's decision. The court relied on circuit precedent in holding that § 363(m) creates a jurisdictional bar to appellate review of a sale order so long as the sale was made to a good-faith purchaser and was not stayed pending appeal.

The Supreme Court granted MOAC's petition for a writ of certiorari to resolve a circuit split over whether § 363(m) is jurisdictional.

The Supreme Court's Holding in *MOAC*

The Supreme Court held that § 363(m) is not jurisdictional. In so holding, the Court relied on the "clear statement" rule, which dictates that courts will treat a statutory provision as jurisdictional only if Congress "clearly states" it should be construed as such. This rule derives from the Court's recognition of the "unique and sometimes severe consequences" that follow from finding a statute to be jurisdictional. Among these are that "[a]n unmet jurisdictional precondition deprives courts of power to hear the case, thus requiring immediate dismissal," and that "jurisdictional rules are impervious to excuses like waiver or forfeiture." The Court explained that, while Congress need not use "magic words" to state clearly its intent that a statutory precondition be deemed jurisdictional, "the statement must indeed be clear." It is not sufficient, the Court explained, for a jurisdictional reading of a statute to be "'plausible,' or even 'better,' than nonjurisdictional alternatives."

Applying the clear statement rule to § 363(m), the Court held that, rather than exhibit a clear intent to limit a court's "adjudicatory capacity," § 363(m)'s "statutory traits" point towards nonjurisdictional status. For one thing, the statute itself assumes appellate courts' jurisdiction to "revers[e] or modif[y]" a sale or lease authorization. The Court explained that the statute simply adds the "caveat" that a reversal or modification will not affect the validity of a sale or lease made to a party who acted in good faith. No constraints apply to the appeals court's action when the sale or lease was made to a bad-faith purchaser or was stayed pending appeal, or when the appellate court does something other than reverse or modify the sale or lease authorization.

The Court further reasoned that § 363(m)'s context points to a nonjurisdictional interpretation. The Court noted that the U.S. Code has multiple provisions dealing with federal courts' jurisdiction over bankruptcy matters—28 U.S.C. §§ 157, 158, and 1334—yet § 363(m) neither resides among those jurisdictional provisions nor contains any "clear tie" to them.

Having thus concluded that § 363(m) is not jurisdictional, the Court vacated the Second Circuit's judgment and remanded the case for further proceedings consistent with the Court's opinion.

Implications for Bankruptcy Law

The *MOAC* decision generates a number of uncertainties for bankruptcy courts and litigants. The Supreme Court's holding that § 363(m) is not jurisdictional means it is subject to waiver and forfeiture. A purchaser or lease designee who fails to invoke § 363(m)'s limitations at the earliest possible time in an appeal from a sale or lease authorization may be precluded from relying on the statute at a later stage of the appeals process. Where in the appeals process it would be appropriate to invoke § 363(m) may depend on the facts of a particular case. By contrast, per the text of § 363(m), a party challenging a sale or lease authorization may avoid the statute's limitations on appellate relief by seeking a stay pending appeal. Under Federal Rule of Bankruptcy Procedure 8007, which governs stays pending appeal, a party may either move for a stay in bankruptcy court or in the court where the appeal is pending, provided that the party shows that moving first in bankruptcy court is or was impracticable. This increases the potential for prolonged appellate litigation over sale and lease authorizations, which may divert more assets of the estate to cover litigation costs, and reduce the amounts available to creditors.

Another ramification of *MOAC* is its future effect on parties as they negotiate the terms of sales under § 363 of the Bankruptcy Code. While the *MOAC* decision does not disturb § 363(m)'s protections for good-faith purchasers, it may open the door to a court's altering the terms of a sale after the fact when, for example, the bankruptcy court stays a sale or lease authorization pending appeal.

The Court's focus on statutory context is also noteworthy for bankruptcy purposes. The Court described the Bankruptcy Code as having a discrete set of provisions governing federal courts' jurisdiction over bankruptcy matters: 28 U.S.C. §§ 157, 158, and 1334. The Court noted that the Bankruptcy Code contains other provisions with a "clear tie" to these jurisdictional statutes. Although the Court did not expressly label statutes with these "clear ties" as jurisdictional, its analysis might support future arguments and judicial rulings to that effect, the consequences of which cannot currently be foreseen.

Considerations for Congress

MOAC also has implications that exceed the parameters of the Bankruptcy Code. Along with *Wilkins*, this is the second time this term that the Court has applied the clear statement rule to find a statutory provision nonjurisdictional. These holdings may prove instructive for Congress as it considers drafting both jurisdictional and nonjurisdictional statutes in the future.

In both *MOAC* and *Wilkins*, the Court first parsed the text of the statutes at issue for a clear statement before moving on to the statutes' overall context. The Court also said in both cases that, in searching for a clear statement, it is looking to implement Congress's "judgment" or "intent." While the Court made clear that it does not require "magic words" to find that Congress intended a statute to be jurisdictional, Congress might consider including an express statement of its intent whenever it wishes for a statute to have a jurisdictional effect.

Without any clear statement, the Court may consider "statutory traits" such as preconditions to relief or exceptions leading to alternative outcomes. Such traits may weaken the chances that a court will find a statute to be jurisdictional. In *MOAC* especially, the Court emphasized § 363(m)'s lack of language speaking to a court's adjudicatory authority, and that the law suggested different outcomes on appeal based on whether a purchaser acted in good faith, as grounds for holding that Congress did not intend the statute to be jurisdictional. By contrast, the Court also suggested other statutory traits that might lead it to find that Congress intended a statute to have jurisdictional effect—for example, if the provision cross-references another jurisdictional statute or is situated among other provisions governing the scope of a court's jurisdiction over certain subject matter. Thus, in drafting future statutes or amending existing provisions that Congress intends to be jurisdictional, Congress not only may consider adding language expressly stating such intent, but might also cross-reference to other jurisdictional statutes.

What then should Congress do if it intends a statute to be nonjurisdictional? The Supreme Court's decisions reflect a position that courts will presume a statute to be nonjurisdicitonal absent a clear statement otherwise. It follows that Congress could draft such a nonjurisdictional statute by refraining from making any such clear statement as well as by avoiding the other "statutory traits" of jurisdictional status discussed above.

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